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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1297

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner

VS.

INEZ GARCIA,
Respondent

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District, Division One

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The petitioner State of California respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division One, entered on December 29, 1975.

OPINION BELOW

The opinion of the California Court of Appeal is reported as *People of the State of California v. Inez Garcia,* 54 Cal.App.3d 61, 126 Cal. Rptr. 275, ____

P.2d ..... (1975). A copy of this opinion is set forth as Appendix A to this petition.

JURISDICTION

The judgment of the California Court of Appeal was entered on December 29, 1975. The California Supreme Court denied a hearing on February 26, 1976. This petition for certiorari was filed within 90 days of the California Supreme Court order. This Court's jurisdiction is invoked under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether respondent's constitutional right to a finding of guilt beyond a reasonable doubt was denied by the trial court in instructing the jury on the definition of reasonable doubt.

2. Whether, if the trial court did err, the error was harmless beyond a reasonable doubt.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Fourteen, section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

STATUTES INVOLVED

California Penal Code section 1096.

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'"

STATEMENT OF THE CASE

A. Proceedings in the State Courts:

On October 4, 1974, Inez Garcia, appellant below, respondent herein, was found guilty by a jury after trial in the Superior Court of the County of Monte-

rey, California of second degree murder (Calif. Pen. Code § 187) (CT 106-107).[1]

On October 21, 1974, she was sentenced to the California Women's Correctional Training Facility, Frontera, California, for the term prescribed by law, five years to life (CT 125-126).

The judgment was reversed by the California Court of Appeal in a published opinion filed on December 29, 1975 (Appendix A, 54 Cal.App.3d 61, 126 Cal. Rptr. 275 (1975)).

On January 6, 1976, the Court of Appeal granted respondent's application for bail. Bail was subsequently set at $5000. The bail was posted, and respondent was thereafter released.

On January 29, 1976, the People's Petition for Rehearing by the Court of Appeal was denied. Sims, J., of the Court of Appeal was of the opinion that the petition should have been granted.

The People's Petition for Hearing in the California Supreme Court was denied on February 26, 1976. A copy of the order appears as Appendix B to this petition.

B. Statement of the Facts Adduced at Trial:

On March 19, 1974, at approximately 6:00 p.m., Chrisofono Solis went to Freddie Medrano's apartment in Soledad in order to purchase a "lid" of marijuana (RT 172, 244). Solis knew both Freddie

[1]A copy of the Clerk's Transcript (CT) and a copy of the Reporter's Transcript (RT) have been lodged with the Court.

Medrano and respondent Inez Garcia (RT 171, 213-214).

When Solis arrived at the apartment, Medrano was speaking on the telephone in respondent's room. Medrano was speaking in both Spanish and English to someone in Texas (RT 173, 223-224). At the time, the respondent was present in the apartment (RT 173).

While Medrano was speaking on the telephone, and for an hour thereafter, he and Solis shared some marijuana cigarettes (RT 175, 225, 244-245). At approximately 8:00 p.m., Solis and Medrano left the apartment and attempted to find some more marijuana. The two were unsuccessful, and returned to Medrano's apartment at about 9:30 p.m. (RT 175-178, 231, 233-234, 236, 245). When Solis and Medrano arrived back at the residence, the respondent and a few women were there (RT 178, 259).

Upon arriving back at Medrano's residence, Miguel Jiminez (the victim) called to Solis from an automobile parked across the street. There were other people with Jiminez in the automobile. Solis did not go over to see what Jiminez wanted, as he thought that Jiminez was drunk (RT 239-241, 309-310).

After entering the residence, Solis and Medrano smoked some more marijuana (RT 178, 245, 248-249).

Between 8:30 and 8:45 p.m., Miguel Jiminez and Louie Castillo arrived at Medrano's apartment (RT 51, 98, 245-246). Castillo, a 17-year-old resident of Soledad, knew Medrano and respondent. He lived

next door to Medrano, and in the past had purchased heroin from Medrano (RT 31-32, 49). In fact, on March 18, the day before the murder, Castillo had used heroin purchased from Medrano (RT 159-160). However, Castillo had never seen any narcotics in Medrano's apartment, and respondent was not present when he had acquired the heroin on March 18 (RT 142, 160).

Prior to going to Medrano's apartment, Castillo and Jiminez had been drinking with some friends (RT 95-98). When they arrived, respondent was at the residence, along with Medrano, Solis, Rosa Bracamonte, Alicia Alcaraz, and one or two other people. Shortly after their arrival Alicia, Rosa and the other adults present left, leaving Castillo, Jiminez, Solis, Medrano, and the respondent (RT 51, 101).

Castillo and Jiminez, along with Medrano and respondent, then began to drink. Respondent was drinking whiskey (RT 43, 106, 179). Shortly thereafter, while Medrano was eating dinner, an argument began between Medrano, Jiminez and Castillo. Castillo and Jiminez criticized Medrano because he was not a "home town" boy and because Medrano considered himself a "big man" (RT 55-58, 180-181, 251-252). Drugs were mentioned in the course of the argument (RT 120, 253).

As the argument progressed, Medrano asked Castillo to step outside. The two went outside, where Castillo hit Medrano in the face. Castillo then came back into the apartment. After about five minutes Medrano reentered the apartment (RT 59, 146, 148, 183).

Medrano and Castillo then got into another fight. Jiminez intervened and proceeded to throw Medrano against the couch and punch and kick him (RT 59-60, 148-149). Respondent attempted to stop the fight (RT 185). Solis also tried to hold Jiminez back, but was told to "back off" (RT 185).

As a result of the beating, Medrano suffered a bloody nose. He went into a room to clean up his face (RT 130, 151, 185). While Medrano was in the room, Jiminez brandished a knife that he had earlier taken from the kitchen and stated that he would throw it at Medrano if Medrano came out of the room with a gun (RT 187, 262-263, 272-273). While Medrano was in the room, respondent asked Castillo and Jiminez why they had beaten up Medrano (RT 186). Subsequently, Medrano came out of the room and told Jiminez and Castillo that he did not deserve to have been beaten up (RT 278). During this period of time, Castillo and Jiminez were acting as though they "owned the place" (RT 279).

After Medrano came out of the room, Jiminez pointed the knife at Medrano and told him to stop "dealing" and to get out of town. Medrano said he would do so (RT 60-61, 63, 130, 151). Shortly thereafter, Castillo and Jiminez left the residence. While they were walking away, respondent told Jiminez to forget about everything (RT 62, 133, 188, 284). Approximately ten minutes elapsed between the fight and the departure of Castillo and Jiminez (RT 129). Castillo denied that he raped respondent before leaving the apartment (RT 133).

After Castillo and Jiminez had left, Solis overheard Medrano state, in respondent's presence, that he wanted to kill Jiminez. Respondent told Medrano that Medrano should not do it because he "wouldn't be able to get out" but that she could do it because she could raise the money for bail (RT 190-193).

While Medrano and respondent were discussing what they planned to do to Jiminez, the telephone rang and respondent answered it. After hanging up the telephone, respondent stated that she had received a tip that someone was going to come and beat them up again. The phone call was made by Joe Mendoza, who had been told about the beating by Castillo and Jiminez (RT 67, 192-194, 298-300, 336-338). Solis, who was still in the apartment, did not hear respondent mention that her life had been threatened by the caller (RT 300).

Immediately after this call, respondent made a telephone call. She subsequently told Solis and Medrano that she had informed her family that someone had "beat her up" in her house and that she may get into trouble (RT 301). Solis did not hear respondent state on the telephone that she had been raped (RT 302).

While respondent was making a phone call, Medrano went into his bedroom and got a .22 caliber rifle and a shotgun (RT 194, 196). Medrano also brought out some .22 caliber bullets and asked respondent if she had any shotgun shells. Respondent stated that she did have some shotgun shells in her room. Respondent then began to load the .22 caliber rifle while Medrano went into respondent's room and

got the shotgun shells (RT 196-199). After loading the weapons, respondent and Medrano spent about three minutes cleaning up the house (RT 200-201).

At about 10:00 p.m., respondent and Medrano left the house. Medrano was carrying the .22 and respondent was carrying the shotgun. The .22 was wrapped inside a white sheet and the shotgun was in a case (RT 203-204). Solis did not see respondent or Medrano get into a car, but he did hear the car start up and the door slam (RT 205). After two minutes, Solis then left the residence. While he was driving home he saw Medrano's car, with its lights off, turning off Monterey Street (RT 207-208, 211).

When respondent left the house, Solis did not see any rips in her blouse, nor did he notice that respondent was bruised (RT 190, 207).

Meanwhile, Castillo and Jiminez, after leaving Medrano's apartment, had gone to Joe Mendoza's house and told Mendoza what they had done to Medrano (RT 63-64, 157-158). After about forty minutes, Jiminez and Castillo left and began to walk down Monterey Street (RT 69). While walking down the street, they said hello to Dima Gallardo and David Ferrel, who were standing on Dima Gallardo's front porch (RT 7, 449-450, 533-535). Shortly thereafter, Castillo saw Medrano's car, with the lights on, coming behind him (RT 135, 156). Ferrel also saw Medrano's car (RT 452). As Castillo and Jiminez turned around, Castillo saw Medrano's car stop a few feet behind them. Castillo then saw respondent get out of the car and start shooting. Castillo ran away,

but later returned and saw Jiminez lying on the ground (RT 74-75). Castillo did not have a fight with Medrano at the scene (RT 156).

Both Dima Gallardo and David Ferrel saw a woman get out of a car and start shooting a rifle (RT 454-457, 534). Ferrel saw Castillo run from the scene and heard the woman say, "Give me the shotgun. I'm going after Louie." (RT 457). The driver then said, "No, let's go." The woman then got back into the car and the car proceeded down Monterey and turned left at First Street (RT 459-461, 537). Twenty to forty minutes had passed between the events at the apartment and the killing.[2]

Subsequently, the police were notified and arrived at the scene. Miguel Jiminez was found lying in an alley bleeding profusely from the face (RT 632). A knife was found next to the body (RT 19, 463, 632). A subsequent autopsy revealed that the cause of death was a gunshot wound in the head (RT 648). At the time of death the victim had a blood alcohol count of .16 (RT 651).

Shortly after the killing, respondent and Medrano went to Rosa Bracamonte's house (RT 396-397, 554, 558). When they entered the house, Medrano had a scratch on his face (RT 398). After entering the house, respondent stated that she had shot Miguel Jiminez (RT 398, 555, 588). Alicia Alcaraz, who was

[2]Solis testified that Castillo and Jiminez left at 9:20 p.m. (RT 282). David Ferrel and Dima Gallardo testified that the shooting took place shortly after 9:40, possibly as late as 9:50 (RT 469, 537, 540). Castillo claimed that after leaving the apartment he and the victim spent 40 minutes at Mendoza's (RT 69).

also present in the house, asked respondent why she had shot Jiminez. Respondent stated either that Jiminez had tried to rape her or that he had raped her (RT 589, 609). Everyone started discussing the incident and Alicia may have stated that respondent did not look like she had been raped (RT 556, 589). A discussion then ensued about whether or not someone should hit respondent. Respondent suggested that someone hit her (RT 399, 556). After Medrano and another man present refused to strike her, Juan Carbahal, who was visiting Rosa, struck respondent in the face (RT 400, 430, 557, 590-591). Before striking respondent, Juan gave respondent a coat, as her blouse was torn (RT 403). Both Rosa and Alicia indicated that while respondent's blouse was slightly ripped when she entered the residence, the blouse was torn again while she was in the house (RT 557, 589-590).[3]

Subsequently, respondent, along with Medrano, Carbahal and Alicia, went to Alicia's house (RT 404-405, 561, 592-593). After arriving, respondent sat down next to a heater and placed a rifle against the wall (RT 596). While at Alicia's, Medrano hid his car, as Alicia was afraid for her children, and as respondent mentioned that she was in fear of the Jiminez brothers (RT 599, 619-620).

Subsequently, Alicia and Medrano left the residence in Alicia's car in order to get some cigarettes

[3]Carbahal, however, testified that the blouse appeared in the same condition in court as it did when he first saw it on the evening of the murder (RT 402).

for respondent (RT 601). Officers stopped the car and Alicia told them that respondent was at her house. The police proceeded to Alicia's house and arrested respondent, who surrendered without incident (RT 601-602, 653).

Defense Case

Respondent took the stand in her own behalf and testified that on March 19, 1974, while Medrano was out of the apartment, Castillo and Jiminez came over to the residence and began to harass her and touch her (RT 1311, 1333-1335).

Subsequently, Medrano came home. While he was eating his dinner, Jiminez put his finger in Medrano's food (RT 1337). An argument then ensued between Castillo, Jiminez and Medrano. There was nothing said about drugs in the course of the argument (RT 1312, 1337-1338). At some point Medrano and Castillo went outside. Shortly thereafter Louie came back in and bragged about how he had beaten up Medrano. Medrano was again beaten by Castillo and Jiminez when he came back in the house (RT 1339-1340).

After the beating, Castillo and Jiminez pulled respondent outside. As they were walking around the house Castillo hit her and ripped her blouse. Both Castillo and Jiminez told respondent that they were going to show her what a "home town boy" was. They also called her a "bitch" (RT 1351). Jiminez did not touch her, but stood in the alleyway so she could not escape (RT 1345-1346, 1352-1353). According to respondent, she then became frightened and took off

her clothes, and was raped by Louis Castillo (RT 1310, 1316, 1357).

After the attack, respondent went back into the house. Solis was still there. The phone rang and the people on the other end of the line were laughing and threatened to kill her if she did not get out of town (RT 1310-1311, 1315, 1361-1362).

Respondent then telephoned her brother-in-law in Florida and told him she was going to go out and kill the people who had attacked her (RT 1343, 1364). She loaded her .22 caliber rifle and started out on foot to look for Castillo and Jiminez (RT 1316, 1365, 1370-1371).

Respondent admitted that she encountered Castillo and Jiminez, and that she shot and killed Mike Jiminez. She killed Jiminez because he had helped Castillo rape her. Respondent stated that that was the only reason she killed him (RT 1310). She also stated that, "I'm not sorry that I did it and the only thing I'm sorry is that I missed Louie," and that "if I had to do it again, I would do it again" (RT 1365).[4]

After the shooting, respondent went to Rosa Bracamonte's house, where she mentioned that she had been raped. She did not remember that her blouse was ripped while she was at Rosa's house (RT 1373-

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[4]At one point during the presentation of the defense case, respond approached the bench and said, "Why don't you just find my (sic) guilty and put me in jail. That's what you want anyway. I killed the motherfucker because I was raped, and I'll kill him again. Your (sic) acting like an old—you pig." (RT 815).

1374). Respondent also did not remember if Juan Carbahal hit her (RT 1374).

After leaving Rosa's house, respondent drove to Alicia Alcaraz's house, where she was arrested. At the time of her arrest, she admitted that she had shot Mike Jiminez (RT 1368).

Respondent admitted that at no time did she tell the arresting officer or the district attorney's office that she had been raped. She did not tell anybody about the rape because she was ashamed to talk about it (RT 1316, 1378).

Respondent's codefendant, Medrano, also took the stand on his own behalf and testified that on March 19, 1974, Castillo and Jiminez were at his apartment and began to criticize him because he was not a "home town" boy. One of them also stuck his finger in his food (RT 1096, 1100). Medrano and Castillo then went outside. He also remembered seeing a knife and at some point he noticed that respondent's hair was disheveled and her blouse was torn (RT 1103-1105).

Subsequently, Medrano got into his car and drove around. Respondent was not with him. Medrano denied that he took a shotgun with him in the car (RT 1107-1108). While he was driving his car, Medrano saw Castillo and Jiminez on Monterey Street. Medrano also remembered that he got into another fight with Castillo. At that point, Medrano heard some shots and saw respondent with a rifle. He also saw Castillo running away. Medrano then got back into his car and respondent got in with him (RT 1117).

Medrano also remembered going to Rosa's house and Alicia's house. Respondent was with him at this time but he could not recall what happened (RT 1121).

After arriving at Alicia's residence, Medrano went out with Alicia to look for some cigarettes and was subsequently arrested (RT 1121, 1270).

REASONS FOR GRANTING THE WRIT

The Court of Appeal's determination that the trial court, in instructing the jury on the definition of reasonable doubt, violated *In re Winship,* 397 U.S. 358 (1970), is legally erroneous and is in conflict with the well-established principle that a single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. The Court of Appeal's determination is thus in conflict with this Court's opinion in *Cupp v. Naughten,* 414 U.S. 141 (1973). In viewing the overall charge, it is clear that the jury was properly instructed on the definition of reasonable doubt.

Assuming that the trial court erred, the petition for certiorari should be granted, as the Court of Appeal's determination that the error requires reversal under *Chapman v. California,* 386 U.S. 18 (1967), is unfounded. The facts of the case, from the mouth of respondent herself, compel the conclusion that any error was harmless beyond a reasonable doubt.

ARGUMENT

I

THE COURT OF APPEAL'S DETERMINATION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE DEFINITION OF REASONABLE DOUBT IGNORES THE WELL-ESTABLISHED PRINCIPLE THAT INSTRUCTIONS MUST BE VIEWED IN THE CONTEXT OF THE OVERALL CHARGE AND IS LEGALLY ERRONEOUS.

In instructing the jury on reasonable doubt, the trial court stated:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge.[5]
>
> "You are not permitted to find the defendant guilty of the crime charged against him except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[6]

[5]This instruction is based on Calif. Pen. Code § 1096.

[6]This instruction was requested by "defendant" (CT 156).

> "In other words, reasonable doubt means just what the term implies, doubt based upon reason, doubt that presents itself in the minds of reasonable people who are weighing the evidence in the scales, one side against the other, in a logical manner in an effort to determine wherein lies the truth.'"[7] (RT 1565:16-1566:11).

In reversing the conviction, the California Court of Appeal held that the last paragraph of the above quoted instruction was "strikingly comparable to the civil case rule of '"preponderance of evidence" [by which] is meant such evidence as, *when weighed with that opposed to it,* has more convincing force, and from which it results that the greater probability' (emphasis added) of truth lies therein." Appendix A, p. xi; 54 Cal.App.3d 61, 69; 126 Cal.Rptr. 275, 279. Consequently, the court held that the last paragraph diluted the fundamental principle of proof beyond a reasonable doubt required by the due process clause of the Fourteenth Amendment and violated *In re Winship,* 397 U.S. 358. Appendix A, p. xii; 54 Cal. App.3d 61, 69; 126 Cal.Rptr. 275, 280. The court also held that the error was not harmless beyond a reasonable doubt, citing *Chapman v. California,* 386 U.S. 18.

Petitioner submits that the Court of Appeal's conclusion ignores the principles enunciated by this Court in *Cupp v. Naughten, supra.* In *Cupp,* defendant Naughten was convicted in an Oregon state court of

[7]This instruction was given on the trial court's own motion (CT 251).

armed robbery. The trial court fully charged the jury on reasonable doubt and presumption of innocence and also rendered the following instruction:

> "Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption." *Id.* at 143.

Following affirmance of his conviction on state appeal, Naughten sought federal habeas corpus relief. The District Court denied his petition, but the Ninth Circuit reversed, holding that the instruction had been almost universally condemned and that the effect of the challenged instruction was to place the burden on Naughten to prove his innocence. *Id.* at 143-144.

In reversing the Ninth Circuit, this Court noted that the instruction had been criticized because it may "'dilute,' 'conflict with,' 'seem to collide with' or 'impinge upon' a criminal defendant's presumption of innocence; 'clash with' or 'shift' the prosecution's burden of proof; or 'interfere' with or 'invade' the province of the jury to determine credibility." *Id.* at 145-146 (footnote omitted).

In response to these criticisms, this Court stated:

> "In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a *single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.* Boyd

> v. United States, 271 U.S. 104, 107, 70 L.Ed. 857, 46 S.Ct. 442 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see Cool v. United States, 409 U.S. 100, 34 L.Ed.2d 335, 93 S.Ct. 354 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Id.* at 146-147. (Emphasis added).

And, in response to the Ninth Circuit's declaration that the other instructions could not "cure" the challenged instruction, this Court noted:

> "But we believe this analysis puts the cart before the horse; the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 147.

Finally, in holding that the conclusion should not be taken as a retreat from the principles announced in *In re Winship*, 397 U.S. 358 (1970), this Court stated:

> "Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon law. It would be possible perhaps as a matter of abstract logic to contend that any instruction

suggesting that the jury should believe the testimony of a witness might in some tangential respect 'impinge' upon the right of the defendant to have his guilt proved beyond a reasonable doubt. But instructions bearing on the burden of proof, just as those bearing on the weight to be accorded different types of testimony and other familiar subjects of jury instructions, are in one way or another designed to get the jury off dead center and to give it some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard. The well-recognized and long-established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from *Winship*." *Id.* at 148-149. *See also United States v. Park,* 421 U.S. 658, 674 (1975).

Petitioner submits that the California Court of Appeal made the same errors that resulted in the reversal of the Ninth Circuit in *Cupp v. Naughten.* The Court of Appeal failed to analyze the instruction in view of the overall charge and, by engaging in abstract and conjectural analysis, emasculated the trial court's function to assist the jury.

The instructions, read as a whole, do not instruct the jury to employ a preponderance of evidence test but quite clearly state that the state has a burden of proving the defendant guilty beyond a reasonable doubt. It is also quite clear that the last paragraph ("In other words, reasonable doubt means just what the term implies . . . .") does not instruct the jury to employ a preponderance of evidence test or in

fact, to employ *any* test. The jury was simply reminded that reasonable doubt means that doubt that presents itself in the minds of reasonable men weighing the evidence. Contrary to the California Court of Appeal's holding, there is *no* mention or inference that after such a weighing the jury should decide if the prosecution evidence "has more convincing force and from which it results that the greater probability of truth lies therein." If such language were included in the instructions, there would be an obvious conflict with the earlier instruction defining reasonable doubt.

As there is no mention of any standard to be applied, the California Court of Appeal was apparently troubled by the words "weighing the evidence in the scales, one side against the other, in a logical manner in an effort to determine wherein lies the truth." Petitioner submits that such an innocuous comment does no more than paraphrase that portion of Penal Code section 1096 which, in defining reasonable doubt, states: "It is that state of the case, which, *after the entire comparison and consideration of all the evidence,* leaves the minds of the jurors . . ." In *every* case there is a weighing, or consideration and comparison of the evidence.[8] This weighing process is hence not "wholly foreign to the concept of proof beyond a reasonable doubt." Appendix A, p. xi; 54 Cal.App.3d 61, 69; 126 Cal.Rptr. 275, 279. It is the

[8]"Weigh" is a synonym of "consider." Webster's New International Dictionary, Second Ed., Unabridged, p. 2897.

only way, absent a practical alternative, that a jury goes about deciding a case. This is not to say that in so doing, they are to disregard the instructions given in this case that the People have the burden of proving guilt beyond a reasonable doubt.

Petitioner's contention that the trial court's instructions did not mislead the jury or dilute the concept of proof beyond a reasonable doubt is supported by the fact that there was *no* objection raised by respondent to the court's instructions, indicating that counsel for respondent did not feel that the instructions misled the jury. Petitioner also points out that the record is devoid of any request for clarification or additional instructions on the matter. *See Mullaney v. Wilbur,* 421 U.S. 684, 704 n.* (1975) (concurring opinion of Chief Justice Burger and Justice Rehnquist).

Consequently, petitioner submits that the California Court of Appeal's conclusion that the trial court's instructions on reasonable doubt violated the principles of *In re Winship, supra,* is erroneous and completely ignores the overall charge to the jury.

II

ASSUMING THAT THE TRIAL COURT ERRED, THE CALIFORNIA COURT OF APPEAL'S DETERMINATION THAT THE ERROR REQUIRES REVERSAL IS UNFOUNDED.

The California Court of Appeal held that

> "We are unable to declare, beyond a *reasonable doubt (see Chapman v. California, supra,* 386 U.S. 18, 24), that had the jury applied the correct evidentiary criteria to the factual issues submitted to them, a verdict more favorable to the defendant would not have been reached. The instructional error of the trial court was accordingly not harmless, and the judgment must be reversed." Appendix A, p. xiv, 54 Cal.App.3d 61, 71; 126 Cal.Rptr. 275, 281, ... P.2d .....

In support of this conclusion, the California Court of Appeal did not attempt to summarize the facts of the case, but stated:

> "From the instructions given by the trial court, it appears that there was some evidence that Inez Garcia had acted with a lack of 'malice' or under 'heat of passion' without sufficient provocation, or under 'diminished capacity' caused by voluntary intoxication. Such evidence, if found true by the jury, would have called for a verdict of guilty of the lesser crime of manslaughter. Other evidence that she was not 'conscious' of the homicidal act, or that she acted in 'self-defense' would, if found true by the jury, have required a verdict of not guilty." Appendix A, p. xiii; 54 Cal.App. 3d 61, 70; 126 Cal.Rptr. 275, 280.

Petitioner submits that such a finding completely ignores respondent's own testimony. Respondent ad-

mitted that after the alleged rape, she telephoned her relatives and told them she was going to kill the people who had allegedly attacked her (RT 1343, 1364). Respondent, by her own admission, then loaded a rifle and started out on foot to look for her victims (RT 1316, 1365, 1370-1371). When she encountered Castillo and Jiminez, she shot and killed Mike Jiminez and testified that that was the *only* reason she killed him (RT 1310). Respondent also stated that ". . . I am not sorry that I did it and the only thing I am sorry (sic) is that I missed Louie," and that ". . . if I had to do it again, I would do it again." (RT 1365). This evidence, along with respondent's outburst in court,[9] compel the conclusion, beyond any reasonable doubt, that a verdict more favorable than second degree murder would not have resulted in the absence of the instruction. There is simply no logical basis for the Court of Appeal's conclusion that the jury, under the state of the evidence, could have returned a verdict of not guilty on the theories of excusable homicide or unconsciousness. Respondent, by her own testimony, was *conscious* at the time of the act and killed because of the *alleged rape,* not in self-defense or in the defense of another. As to a possible manslaughter conviction because of diminished capacity, the planning respondent admittedly engaged in, along with the admitted stalking of the

[9]At one point during the presentation of the defense case, respondent approached the bench and said, "Why don't you just find my (sic) guilty and put me in jail. That's what you want anyway. I killed the motherfucker because I was raped, and I'll kill him again. Your (sic) acting like an old—you pig." (RT 815).

victims, quite clearly negates such a finding. As stated by the trial court:

> ". . . I think she is proved guilty of first degree murder and it was premeditated murder, a premeditated murder. First, premeditation doesn't take very long and she absolutely calculated that she was going to kill that fellow and she took her rifle out to kill him as admitted by her own counsel's statement at least fifteen minutes later and the evidence is subject to the interpretation that it might have been half an hour later, after she had done these various things and I think she is very fortunate to get off with second degree murder." (RT 1844:14-23).

The fact that the trial court instructed the jury, at respondent's request, on theories of excusable homicide, unconsciousness, and diminished capacity do not, petitioner submits, excuse the California Court of Appeal from reviewing the actual trial record to determine if an error is harmless. It is not unreasonable to assume that many defense requested instructions are given in an overabundance of caution, but in determining if an error is harmless the *facts,* and not the jury instructions, are determinative. Those facts indicate that it is not reasonable to conclude that the alleged error requires reversal in this case.

CONCLUSION

For the above reasons, petitioner respectfully requests this Court to issue a writ of certiorari to the Court of Appeal of the State of California, First Appellate District, Division One, to review and reverse the decision in this case.

Dated, March 9, 1976.

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(Appendices Follow)

APPENDICES

Appendix A

(CERTIFIED FOR PUBLICATION)

In the Court of Appeal
State of California
First Appellate Division

DIVISION ONE

1 Crim. 14104

(Sup. Ct. No. CR 4259)

People of the State of California,
Plaintiff and Respondent,
vs.
Inez Garcia,
Defendant and Appellant.

[Filed December 29, 1975]

OPINION

We find ourselves concerned, on this appeal by defendant Inez Garcia from a judgment of conviction of second degree murder, with a variant jury instruction on the concept of proof beyond a reasonable doubt.

As is well known, the principles of "presumption of innocence" and "proof beyond a reasonable doubt,"

applicable to prosecutions for crime, are defined by California's Penal Code section 1096, in this manner:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'"

The language is derived from that written in 1850 by Chief Justice Shaw of Massachusetts, in *Commonwealth v. Webster,* 59 Mass. (5 Cush.) 295, 320. It has with near, if not complete, universality been accepted as the best definition of the concept of proof beyond a reasonable doubt. Well intentioned efforts to "clarify" and "explain" these criteria have had the result of creating confusion and uncertainty, and have repeatedly been struck down by the courts of review of this state.

We point out some examples of innovative "reasonable doubt" instructions which have been held erroneous.

People v. Simpson, 43 Cal.2d 553, 565: Here the trial court properly instructed on reasonable doubt in the language of Penal Code section 1096. It then added the following: "'The term "reasonable doubt," as used in these instructions, means a doubt which has *some good reason* for its existence *arising out of evidence in the case;* such doubt as you are able to find a *reason for in the evidence.* As applied to the evidence in criminal cases, it means an *actual and substantial doubt growing out of the unsatisfactory nature of the evidence* in the case. It does not mean a doubt which arises from some mere whim or vagary or from any groundless surmise, suspicion or guess.'" (Fn. omitted.) The court found the italicized language to be improper, but in the context of the case nonprejudicial.

People v. Smith, 164 Cal. 451, 463: "The court further instructed the jury as follows: 'A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case. If, after considering all the evidence you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.'" Pointing out that such instructions were "criticized and condemned" the court said, "It certainly does not better the long approved instruction of Chief Justice Shaw."

People v. Maughs, 149 Cal. 253, 261-262: "The court instructed the jury as follows: 'For the purpose of this trial and before you had heard any evidence a presumption of the innocence of the accused arose.

Independent of evidence he was presumed by you to be innocent. This presumption of innocence arising at the outset, attends him throughout the trial and until you have finally determined upon your verdict. You are not to forget it in weighing the testimony.'" Finding error, the court said, "Nothing can be gained and much may be sacrificed by such uncalled for departures from the plain letter of the statute [Pen. Code, § 1096], and from the oft-repeated and oft-approved language in construing it."

People v. Huntington, 138 Cal. 261, 262-263: "Appellant contends that the following instruction was erroneous: . . . '"Moral certainty" is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it.' In our opinion this instruction should not have been given."

People v. Schoedde, 126 Cal. 373, 376: "The court gave the following instruction to the jury: 'If, after a careful and impartial consideration of all the evidence in the case, you can say and feel that you are morally convinced of the guilt of the defendant, and are fully satisfied of the truth of the charge, then you are convinced beyond a reasonable doubt, and your verdict should be one of conviction.' This instruction has some support in a few of the early decisions of this court, but it is not a perfectly sound legal instruction by any means, and should never be given. It is better by all means to define a reasonable doubt in the way so often declared unobjectionable by this court, rather than attempt new departures."

People v. Paulsell, 115 Cal. 6, 6-7, 10: "The instruction given to the jury by the court on the subject of reasonable doubt is as follows: 'As the exclusive arbiters of the facts, it is for you to say what has been proved and established to your satisfaction in this case, being minded that if that proof to your satisfaction shall make against the defendant, then it must be proof beyond all reasonable doubt and to a moral certainty. . . . Now, the reasonable doubt that you have heard me speak of means precisely what the words import: A fair doubt, growing out of the evidence in the case, based upon reason and common sense. It is such a doubt as may leave the minds of the jury, after considering all the evidence in the case, in that state that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.' . . . [¶¶] The judgment must be reversed and a new trial ordered on account of instructions given and refused upon the subject of reasonable doubt—a subject upon which we had hoped there would be no further difficulty, . . ."

People v. Bemmerly, 87 Cal. 117, 120, 121: "Instruction No. 10, given at the request of the prosecution, gives a lengthy definition of 'a reasonable doubt,' and contains this clause: 'It must not be one that is merely fanciful,—created ingeniously in your minds, to escape the consequences of an unpleasant verdict; it must be an honest doubt,—such a doubt as strikes the conscientious mind, and one that clouds the understanding of those who are honestly seeking to arrive at the truth; *such a doubt as would induce a man of*

reasonable firmness and judgment to act upon it in matters of importance to himself.' . . . [W]e are bound to hold that so much of the instruction in this case as we have Italicized is erroneous."

Trial courts have often been admonished such as, "it would perhaps have been better practice" to have instructed only in the language of section 1096 (People v. Simpson, supra, 43 Cal.2d 553, 566), and to follow "'the language of section 1096 [since failure] to do so is simply inviting error'" (People v. Simms, 144 Cal.App.2d 189, 199; People v. Castro, 68 Cal.App.2d 491, 497). "[M]ost of the instructions of courts on the old subject of reasonable doubt turn out to be erroneous when they ambitiously step outside of well-established bounds." (People v. Lenon, 79 Cal. 625, 629.) Addressing itself to the problem, the court in *People v. Paulsell,* supra, 115 Cal. 6, 10, stated: "We have frequently held that where the well-known definition of reasonable doubt of Chief Justice Shaw in the Webster case had been given to the jury, we would be loth to reverse a judgment for the refusal of the court to give other instructions upon the subject; and we have frequently warned trial courts against departing to any considerable extent from that definition. In *People v. Chun Heong,* 86 Cal. 332, the court, through Beatty, C.J., said: 'We cannot, however, abstain from again expressing the hope that the trial judges who have made use of this form of instruction will eventually see the propriety of returning to the approved definition, which, since the time of Chief Justice Shaw, has never been improved upon.'"

Indeed, it "was to eliminate such claims of error . . . that the legislature enacted Penal Code, section 1096a" (People v. Simms, supra, 144 Cal.App.2d 189, 199), which reads, "In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given."

Other jurisdictions have spoken on the subject. *State v. Morrison,* 72 P. (Kan.) 554, 559: "As has been often said by this court, the term 'reasonable doubt' best defines itself. All attempts at definition are likely to prove confusing and dangerous." *State v. Robinson,* 23 S.W. (Mo.) 1066, 1069: "Every attempt to explain [the definition of reasonable doubt] renders an explanation of the explanation necessary." *People v. Rogers,* 154 N.E. (Ill.) 909, 913: "It is in a term which needs no definition, and it is erroneous to give instructions resulting in an elaboration of it." *State v. Davis,* 28 P. (Kan.) 1092, 1096: "[G]enerally, the attempted definitions of [reasonable doubt] by courts or others are simply misleading and confusing, and not proper explanations of their meaning at all." *Mickey v. Commonwealth,* 72 Ky. (9 Bush) 593, 598: "As it is difficult, if not impossible, to give a precise and intelligible definition of what a reasonable doubt is, without extending an instruction into almost a treatise upon the subject, it seems to this court that the better practice is to follow as nearly as practicable the language of the Criminal Code, which is certainly as intelligible and as easily comprehended as the definition given in this case."

Insofar as we have been able to determine there has been, in this state, but one *authoritative* departure from the strict language of section 1096. Chief Justice Traynor, writing for the court in *People v. Hall,* 62 Cal.2d 104, 112, elaborated upon the principle. He declared: *"To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty."* (Emphasis added.) This concept of reasonable persuasion "to a near certainty" is now a necessarily implied element of section 1096's definition. (See People v. Reyes, 12 Cal.3d 486, 500; People v. Redmond, 71 Cal.2d 745, 756; People v. Wade, 15 Cal. App.3d 16, 26 [cert. den. 405 U.S. 925]; People v. Hughes, 268 Cal.App.2d 796, 801; People v. Turner, 267 Cal.App.2d 440, 443.) It creates no new standard; it only more sharply defines that of section 1096. (See People v. Williams, 10 Cal.App.3d 638, 644, and see the authority there collected.)

It is now firmly, and universally, held that: "The due process clause of the Fourteenth Amendment to the federal Constitution protects the accused against conviction except upon proof beyond a reasonable doubt." (People v. Serrato, 9 Cal.3d 753, 766-767; and see People v. Coleman, 13 Cal.3d 867, 875; People v. Vann, 12 Cal.3d 220, 227.) The United States Supreme Court in *In re Winship,* 397 U.S. 358, 364, has stated: "[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves

people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."

The principle at issue, being essential to a fair trial and grounded in the state and federal constitutional guaranties of due process, must be accorded at least equal dignity with other constitutional rights due the criminally accused; indeed, many believe it entitled to an even higher level of respect that such constitutional precepts, unrelated to the integrity of the guilt finding process, as are declared in *Mapp v. Ohio,* 367 U.S. 643, and *Miranda v. Arizona,* 384 U.S. 436. Unlike the holdings of those cases, it is calculated to safeguard the accused "from dubious and unjust convictions" (see In re Winship, supra, 397 U.S. 358, 362), and to lessen the "risk of convicting an innocent person" (cf. In re Sterling, 63 Cal.2d 486, 487.)

Defendant Inez Garcia was charged with murder, and she admitted committing the act of homicide. We need not here attempt to summarize the voluminous record. It is sufficient to note that the trial court properly concluded that the evidence was such as would, depending upon the factual version found true by the jury, justify any of the several verdicts that they were permitted to reach. Those permissible verdicts were: (1) Not guilty, on the theories of excusable homicide or unconsciousness of the homicidal act; (2) guilty of voluntary manslaughter; (3) guilty of

involuntary manslaughter; (4) guilty of murder, second degree; and (5) guilty of murder, first degree.

At the conclusion of the evidence the jury were properly instructed on the principle of proof beyond a reasonable doubt according to Penal Code section 1096. (See *ante,* pp. 1, 2.)

The trial court then amplified that instruction in the following language:

"In other words, reasonable doubt means just what the term implies, doubt based upon reason, doubt that presents itself in the minds of reasonable people who are weighing the evidence in the scales, one side against the other, in a logical manner in an effort to determine wherein lies the truth."*

This supplemental instruction purported to *explain* the meaning of the previously given language of section 1096. Although that language had spoken in terms of "reasonable doubt," and "presumption of innocence" and the need for " 'an abiding conviction, to a moral certainty, of the truth of the charge,' " the jury were told that it meant no more than a doubt which presented itself to them after "weighing the evidence in the scales, one side against the other, in a logical

*This language was apparently taken from *People v. Rodgers,* 38 Cal.App.2d 360, 364, an opinion responding negatively to an application for supersedeas pending appeal. The court, without discussion or consideration of authority (see 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, §§ 697-698, pp. 4614-4615), found nothing in the instruction "to justify the complaint appellant makes against it." No hearing was sought, or granted, by the Supreme Court (see 6 Witkin, op.cit., § 700, p. 4617), and the instruction, except for the case before us, appears to have never since been followed, or otherwise considered. The case is of doubtful precedential value.

manner in an effort to determine wherein lies the truth."

This final explanatory instruction is strikingly comparable to the civil case rule of " 'preponderance of evidence' [by which] is meant such evidence as, *when weighed with that opposed to it,* has more convincing force, and from which it results that the greater probability" (emphasis added) of truth lies therein. (People v. Miller, 171 Cal. 649, 653; In re Corey, 230 Cal.App.2d 813, 823; see also Lawrence v. Goodwill, 44 Cal.App. 440, 451-452; BAJI (5th ed. 1969) 2.60; Witkin, Cal. Evidence (2d ed. 1966) § 208, pp. 189-190.) It calls upon the jury to *weigh* "the evidence in the scales . . . in an effort to determine wherein lies the truth," and thus the guilt or innocence of the accused. This "weighing" process, where a tipping of the scales determines the "truth," is wholly foreign to the concept of proof beyond a reasonable doubt.

The distinction was made clear by California's Supreme Court. "[I]n civil cases a party may have established an essential fact by a preponderance of the evidence, although, in the light of all the evidence *pro* and *con,* the jury may not be satisfied to a *moral certainty* of the existence of the fact, and the *whole* evidence may not be such as to produce conviction in their minds." (People v. Miller, supra, 171 Cal. 649, 654.) It is recognized throughout the nation, for instance: "The distinction between 'beyond reasonable doubt' in a criminal case and a 'fair preponderance of the evidence' in a civil case has always been recognized in Indiana jurisprudence. The two are

wholly different, clearly recognize distinguishable degrees of burdens of proof and, of course, the duty of establishing a fact 'beyond reasonable doubt' imposes a duty far greater than to establish the same fact by 'a fair preponderance'." (Kempf v. Himsel, 98 N.E.2d (Ind.) 200, 212.)

In any event the criticized instructional language was calculated to divert the jury, in some degree, from their constitutionally prescribed duty not to find guilt unless they "be reasonably persuaded to a near certainty." (See People v. Reyes, supra, 12 Cal.3d 486, 500.) It was, as contended by defendant, a "watering down" of that fundamental principle, a practice decried by *In re Winship, supra,* 397 U.S. 358, 364, where it was said: "It is critical that the moral force of the criminal law *not be diluted* by a standard of proof that leaves people in doubt whether innocent men are being condemned." (Emphasis added.)

For these several reasons we hold that the trial court's supplemental instruction, explaining Penal Code section 1096's definition of proof beyond a reasonable doubt, was erroneously given the jury.

There remains for our consideration the question whether the error was harmless. The point being of constitutional dimension, before the error can be held harmless "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (Chapman v. California, 386 U.S. 18, 24.)

It seems proper at this point to emphasize that the erroneous instruction purported to *explain the meaning* of the earlier instruction on reasonable doubt in the language of Penal Code section 1096. It was the last definitive instruction on the subject given by the court, and therefore must reasonably be deemed to have been uppermost in the minds of the jury during their deliberations.

From the instructions given by the trial court, it appears that there was some evidence that Inez Garcia had acted with a lack of "malice" or under "heat of passion" without sufficient provocation, or under "diminished capacity" caused by voluntary intoxication. Such evidence, if found true by the jury, would have called for a verdict of guilty of the lesser crime of manslaughter. Other evidence that she was not "conscious" of the homicidal act, or that she acted in "self-defense" would, if found true by the jury, have required a verdict of not guilty.

Among others, the trial court read to the jury the following instructions:

"If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder."

"If from all the evidence you have a reasonable doubt whether defendant was capable of forming such specific intent or mental state [concerning intent to kill], you must give that defendant the benefit of that doubt and find that [s]he did not have such specific intent or mental state."

"Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime."

In relation to these, and other, instructions the jury were presumably applying the erroneous reasonable doubt concept as instructed by the trial court. We ourselves are unable to declare, *beyond a reasonable doubt* (see Chapman v. California, supra, 386 U.S. 18, 24), that had the jury applied the correct evidentiary criteria to the factual issues submitted to them, a verdict more favorable to defendant would not have been reached. The instructional error of the trial court was accordingly not harmless, and the judgment must be reversed.

We need not consider other assignments of error relied upon by defendant, since the circumstances out of which they arose will probably not recur at the next trial.

The judgment is reversed. An appeal from non-appealable "other orders" is dismissed.

CERTIFIED FOR PUBLICATION

Elkington, J.

WE CONCUR:

Molinari, P.J.

Sims, J.

Appendix B

ORDER DUE
March 27, 1976

In the Supreme Court
of the
State of California

IN BANK

People

v.

Garcia

[Filed Feb. 26, 1976]

ORDER DENYING HEARING

After Judgment by the Court of Appeal
1st District, Division 1, Crim. No. 14104

Respondent's petition for hearing DENIED.

WRIGHT,
Chief Justice

Supreme Court, U. S.
FILED
MAY 17 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1297

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

INEZ GARCIA,
Respondent.

PETITIONER'S REPLY BRIEF

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1297

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

INEZ GARCIA,
Respondent.

PETITIONER'S REPLY BRIEF

ARGUMENT

I

THE STATE COURT DECISION WAS NOT BASED ON AN INDEPENDENT AND ADEQUATE STATE GROUND

In opposing petitioner's Petition for Certiorari, respondent Garcia concedes that the California Court of Appeal held that the instruction in issue violated the due process clause of the Fourteenth Amendment, but submits that violation of California Penal Code section 1096 provided a state ground for the decision which was independent of the due process ground

(Respondent's Brief in Opposition, hereinafter "RB," pp. 9-13).

Petitioner agrees that this Court will decline to review state court judgments which rest on independent *and* adequate state grounds, even where those judgments also decide federal questions. *Henry v. Mississippi,* 379 U.S. 443, 446 (1965). It is also well established that in deciding this issue, this Court is not bound by the state court and has the duty to look beyond broad language and determine the precise ground on which the judgment rests. *Staub v. City of Baxley,* 355 U.S. 313, 318 (1957); *Black v. Cutter Laboratories,* 351 U.S. 292, 298 (1956).

In the instant case, while the Court of Appeal noted several cases in which reasonable doubt instructions were held erroneous (Appendix A to Petition, hereinafter "Appendix," pp. ii-vii; 54 Cal.App.3d 61, 63-67, 126 Cal.Rptr. 275, 276-280) the holding of the Court was that the questioned instruction was "strikingly comparable to the civil case rule of preponderance of evidence" and diluted the fundamental principle of guilt beyond a reasonable doubt in violation of *In re Winship,* 397 U.S. 358, 364 (1970). Appendix, pp. x-xii; 54 Cal.App.3d at 68-69, 126 Cal.Rptr. at 279-280.

The fact that the court cited *Chapman v. California,* 386 U.S. 18, 24 (1967) for the proposition that a reasonable doubt standard must be applied because the asserted error was of "constitutional dimension" (Appendix, p. xi; 54 Cal.App.3d at 70, 126 Cal.Rptr. at 280) clearly indicates that the court was basing

its decision on federal constitutional grounds. In California, the test for state constitutional error is set forth in *People v. Watson,* 46 Cal.2d 818, 835-836, 299 P.2d 243, 254-255 (1956). As stated in *Watson:* "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." By employing the stricter *Chapman* test, the Court of Appeal recognized that a federal issue was involved. Had the Court of Appeal wished to base its opinion on an adequate and independent state ground, it would have so stated. *See,* e.g., *People v. Krivda,* 8 Cal.3d 623, 624, 105 Cal.Rptr. 521, 504 P.2d 52 (1973).[1]

---

[1]At one point, the Court of Appeal, in referring to the federal protection against conviction except upon proof beyond a reasonable doubt, states:

> "The principle at issue, being essential to a fair trial and grounded in the state and federal constitutional guaranties of due process, must be accorded at least equal dignity with other constitutional rights due the criminally accused; indeed, many believe it entitled to an even higher level of respect than such constitutional precepts, unrelated to the integrity of the guilt finding process, as are declared in *Mapp v. Ohio,* 367 U.S. 643 [6 L.Ed.2d 1081, 81 S.Ct. 1684, 84 A.L.R.2d 933], and *Miranda v. Arizona,* 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974]. Unlike the holdings of those cases, it is calculated to safeguard the accused 'from dubious and unjust convictions' (see *In re Winship, supra,* 397 U.S. 358, 362 [25 L.Ed.2d 368, 374]), and to lessen the 'risk of convicting an innocent person.' (Cf. *In re Sterling,* 63 Cal.2d 486, 487 [47 Cal.Rptr. 205, 407 P.2d 5].)" Appendix, p. ix; 54 Cal.App.3d at 67-68, 126 Cal.Rptr. at 278-279.

While the Court of Appeals mentions "state" and federal constitutional guarantees, petitioner submits that, in light of the Court of Appeal's ultimate holding, and the fact that all of the cases cited in the quoted paragraph are federal decisions, this one reference to "state" does not create an adequate and independent

II

THE HARMLESS ERROR RULE APPLIED BY THE STATE COURT MAY BE REVIEWED BY THIS COURT

In Argument II, respondent contends that the harmless error rule applied by the Court of Appeal is a state question, apparently based on the premise that there is an independent and adequate state ground, and that a state court may apply a more stringent rule than the one announced in *Chapman, supra.* (RB 13-16)

Petitioner agrees that a state may apply a stricter standard to a state error, but respondent's argument begs the question before this Court. It is petitioner's position that the Court of Appeal misinterpreted *federal* authority and improperly reversed respondent's conviction. Further, assuming the Court of Appeal properly held that there was an error in violation of a *federally* protected right, the Court's conclusion that reversal was required pursuant to *Chapman v. California, supra,* was incorrect. Respondent's second argument does not refute petitioner's position, but merely states the obvious: that if this Court disagrees with petitioner and finds that the Court of Appeal based its decision on an independent and adequate state ground, there is no need to review the question of harmlessness. However, in light of Argument I, this Court does have jurisdiction to review the finding of error and, *a fortiori,* the finding of *reversible* error beyond a reasonable doubt.

---

state ground. In any event, where the nonfederal ground is so interwoven with the federal ground as not to be an independent matter, this Court's jurisdiction attaches. *Enterprise Irrig. Co. v. Farmers' Mut. Canal Co.,* 243 U.S. 157, 164 (1917).

CONCLUSION

For the reasons set forth above, in addition to those appearing in the Petition, petitioner respectfully requests this Court to issue a writ of certiorari to the Court of Appeal of the State of California, First Appellate District, Division One, to review and reverse the decision in this case.

Dated, May 12, 1976.

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